

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS ALAN COOK,

Plaintiff-Appellant,

v

SHARON SUE COOK,

Defendant-Appellee.

UNPUBLISHED
December 12, 2017

No. 334436
Oakland Circuit Court
LC No. 2015-830937-DO

Before: GLEICHER, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals as of right the trial court's postjudgment order awarding attorney fees to defendant. We reverse the trial court's order because there was no basis in statute, court rule, common-law exception, or contract to justify the award.¹

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant agreed to a consent judgment of divorce, which the trial court entered on December 15, 2015. The consent judgment awarded the marital home to plaintiff and divided certain items of personal property between the parties. Plaintiff left the marital home in July 2015, returning only once, to retrieve some items of personal property, before the trial court entered the parties' consent judgment of divorce. The consent judgment required defendant to vacate the marital home by January 15, 2016, and stated that "[e]ach party shall be responsible for any damages to the home or the contents caused during his or her time of exclusive use."

¹ The postjudgment order awarding attorney fees is a final order under MCR 7.202(6)(a)(iv). Under MCR 7.203(A), an appeal from a postjudgment order awarding attorney fees is "limited to the portion of the order with respect to which there is an appeal of right." On appeal, plaintiff also challenges an earlier order in which the trial court denied his postjudgment motion to enforce the parties' consent judgment of divorce. However, that earlier order does not meet any of the definitions of a final order set forth in MCR 7.202(6)(a). The earlier order is therefore not appealable as of right and this Court lacks jurisdiction over any claim relating to the order. See MCR 7.203(A)(1). Accordingly, we do not consider plaintiff's challenge to the order denying his postjudgment motion to enforce the consent judgment of divorce.

Plaintiff claimed that when he returned to the marital home in January 2016, he discovered that many of his personal items were missing from the home. Accordingly, he filed a motion to enforce the consent judgment, seeking either the return of the personal property or a money judgment against defendant for the value of the allegedly missing items.

Following an evidentiary hearing, the trial court found that plaintiff did not present sufficient proof that the items in question were missing or that defendant took the items. The court therefore denied plaintiff's motion to enforce the judgment. The trial court then ruled that plaintiff would be required to pay defendant's attorney fees and entered an order awarding defendant \$9,336.70 in attorney fees. On appeal, plaintiff argues that the only possible basis for an award of attorney fees is an attorney fee clause in the consent judgment, which would not support the trial court's award of attorney fees to defendant.

II. STANDARD OF REVIEW

We review a trial court's grant or denial of attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Thomas M Cooley Law Sch v Doe I*, 300 Mich App 245, 263; 833 NW2d 331 (2013). Defendant's entitlement to attorney fees in this case also turns on the interpretation of the contractual language of the consent judgment. "The interpretation of a contract is a question of law reviewed de novo on appeal." *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010) (quotation marks and citation omitted).

III. ENTITLEMENT TO ATTORNEY FEES

In general, attorney fees are not recoverable in a divorce action unless the fees are expressly allowed by statute, court rule, common-law exception, or statute. *Reed*, 265 Mich App at 164. MCR 3.206(C)(2)(a) permits a party to seek payment of attorney fees from an opposing party, but the party seeking the fees must plead and prove circumstances showing that he or she is unable to pay the attorney fees.² Defendant did not do so here. Nor did the trial court make any finding of frivolousness on plaintiff's part entitling defendant to attorney fees under MCR 2.625(A)(2) and MCL 600.2591. Likewise, the court did not make any finding that the attorney fees were incurred because of plaintiff's misconduct. See *Reed*, 265 Mich at 165 (explaining that a common-law exception provides that an award of attorney fees is authorized if the party requesting the fees was forced to incur them because of the adverse party's misconduct).

The consent judgment of divorce contains a provision allowing awards of attorney fees, but by its own terms only the *nonmoving* party may be required to pay attorney fees, and then

² See also MCL 552.13 (explaining that, in a divorce action, a court may require either party to "pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency"). An award of attorney fees under MCL 552.13 is not permitted unless the trial court justifies its award on the basis of a party's financial need. *Reed*, 265 Mich App at 164.

only if the party filing a motion to enforce the judgment prevailed on such a motion. The consent judgment states the following:

If either party has to file a Motion to Enforce any of the terms contained within this Judgment and prevails on the Motion, the party against whom the Motion was filed shall be responsible for all of the prevailing party's attorney fees and costs.

“[A] consent judgment of divorce is a contract that must be interpreted according to the plain and ordinary meaning of its terms[.]” *In re Lett Estate*, 314 Mich App 587, 600; 887 NW2d 807 (2016). “[A] court may not rewrite clear and unambiguous language under the guise of interpretation,” nor may a court “read words into the plain language of a contract.” *Id.* (quotation marks and citations omitted).

Although defendant prevailed on plaintiff's motion to enforce the consent judgment, she was not the party who filed the motion, but rather was “the party against whom the Motion was filed” In other words, with respect to plaintiff's motion to enforce the consent judgment, only plaintiff, as the party who “ha[d] to file a Motion to Enforce” the judgment, could possibly recover attorney fees, and then only if he prevailed. Under the plain terms of the consent judgment, defendant was not entitled to attorney fees because she did not file the motion to enforce the consent judgment. To conclude that defendant was entitled to attorney fees under the consent judgment, a court would have to rewrite the phrase, “the party against whom the Motion was filed shall be responsible,” and replace it with the phrase, “the nonprevailing party shall be responsible.” However, a court may not rewrite the plain language of a contract.

The trial court failed to justify its award of attorney fees to defendant on the basis of a statute, court rule, common-law exception, or contract. Therefore, the court abused its discretion when it awarded defendant attorney fees because it had no legal basis to do so.

We reverse the trial court's order awarding attorney fees to defendant. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Michael F. Gadola

/s/ Colleen A. O'Brien